

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



JAMES F. HAMM.	)	
	)	
Charging Party.	)	Case No. SF-CE-674
	)	
v.	)	PERB Decision No. 500
	)	
SANTA CLARA UNIFIED SCHOOL DISTRICT.	)	April 11, 1985
	)	
Respondent.	)	
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Appearances: Garry. Dreyfus & McTernan. Inc. by Janet K. King and Susan Devencenzi, Attorneys for James F. Hamm; Littler. Mendelson. Fastiff & Tichy by Richard J. Loftus. Jr. and Donald M. Hartford, Jr.. Attorneys for Santa Clara Unified School District.

Before Jaeger, Morgenstern and Burt. Members.

DECISION

BURT. Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Santa Clara Unified School District (District) to the attached proposed decision of an administrative law judge (ALJ) finding that it violated section 3543.5(a) of the Educational Employment Relations Act (EERA or Act)<sup>1</sup> by discriminatorily transferring teacher James F. Hamm.

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<sup>1</sup>The EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Section 3543.5 provides, in relevant part:

It shall be unlawful for a public school employer to:

In its exceptions, the District argues that the ALJ improperly applied the Board's standard, adopted in Novato Unified School District (4/30/82) PERB Decision No. 210, in deciding whether or not discrimination in violation of EERA had occurred. It further argues that the ALJ improperly allocated the burden of proof.

To the contrary, we find that the ALJ correctly applied the Board's Novato test, a test in conformity with that used by the National Labor Relations Board in Wright Line, A Division of Wright Line, Inc. (1980) 251 NLRB 150 [105 LRRM 1169], and upheld by the U.S. Supreme Court in National Transportation Management (1983) 76 L.Ed.2d 667 [113 LRRM 2857], including the allocation of the burden of proof.

Therefore, after a thorough review of the entire record in light of the District's exceptions and Hamm's response thereto, we find that the ALJ's findings of fact and conclusions of law are free from prejudicial error, and we adopt them as our own. We also adopt the ALJ's proposed remedy and order, altering only the year in which reinstatement is to take

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- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

place and the appropriate rate of interest, the latter to conform to Board practice.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Santa Clara Unified School District violated section 3543.5(a) of EERA. Pursuant to section 3541.5(c), it is hereby ORDERED that the District, its governing board and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Restraining, discriminating against, or otherwise interfering with the rights of employees, and James F. Hamm in particular, because of the exercise of their right to participate in an activity protected by the Educational Employment Relations Act.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(a) Upon his request, reinstate James F. Hamm to his former position, or its equivalent position, at Wilcox High School effective the beginning of the 1985-86 school year, without prejudice to his seniority and other rights and privileges.

(b) Make James F. Hamm whole for any loss of pay or other benefits he may have suffered, including a \$500 stipend for each year of service lost as a department chair. The amount paid shall include interest at the rate of 10 percent per annum.

(c) Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not defaced, altered, reduced in size or covered by any other material.

(d) Written notification of the actions taken to comply with this Order shall be made to the regional director of the Public Employment Relations Board in accordance with her instructions.

Members Jaeger and Morgenstern joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD  
An Agency of the State of California



After a hearing in Unfair Practice Case No. SF-CE-674. James F. Hamm v. Santa Clara Unified School District, in which all parties had the right to participate, it has been found that the Santa Clara Unified School District violated Government Code section 3543.5(a) by reassigning James F. Hamm from Wilcox High School to Peterson Junior High School beginning in 1982-83.

As a result of this conduct we have been ordered to post this Notice and we will:

1. CEASE AND DESIST FROM:

(a) Restraining, discriminating against, or otherwise interfering with the rights of employees, and James F. Hamm in particular, because of the exercise of their right to participate in an activity protected by the Educational Employment Relations Act.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(a) Upon his request, reinstate James F. Hamm to his former position, or its equivalent position, at Wilcox High School effective the beginning of the 1985-86 school year, without prejudice to his seniority and other rights and privileges.

(b) Make James F. Hamm whole for any loss of pay or other benefits he may have suffered, including a \$500 stipend for each year of service lost as a department chair. The amount paid shall include interest at the rate of 10 percent per annum.

Dated: \_\_\_\_\_ SANTA CLARA UNIFIED SCHOOL DISTRICT

By \_\_\_\_\_  
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE DEFACED. ALTERED. REDUCED IN SIZE OR COVERED BY ANY OTHER MATERIAL.

STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD



JAMES F. HAMM,	)	
	)	Unfair Practice Charge
Charging Party,	)	Case No. SF-CE-674
	)	
v.	)	
	)	
SANTA CLARA UNIFIED SCHOOL	)	PROPOSED DECISION
DISTRICT,	)	(6/14/83)
	)	
Respondent.	)	

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Appearances; Janet K. King and Susan Devencenzi (Garry, Dreyfus & McTernan), attorneys for James F. Hamm; Richard J. Loftus, Jr. and Donald M. Hartford, Jr. (Littler, Mendelson, Fastiff & Tichy), attorneys for the Santa Clara Unified School District.

Before; Barry Winograd, Administrative Law Judge.

PROCEDURAL HISTORY

On July 13, 1982, James Hamm filed an unfair practice charge against the Santa Clara Unified School District (hereafter District). On August 5, 1982, the charge was amended. As amended, the charging party alleged that in May 1982 he had been reassigned as a teacher from a high school to a junior high school. According to Hamm, the reassignment was discriminatory and constituted a violation of section 3543.5(a) of the Educational Employment Relations Act (hereafter EERA or Act).<sup>1</sup>

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<sup>1</sup>The EERA is codified at Government Code section 3540, et seq., and is administered by the Public Employment Relations

The PERB issued a complaint on August 9, 1982. The District filed its answer on August 18, 1982, admitting certain facts, but generally denying the allegations of unlawful conduct. The District affirmatively alleged that Hamm's reassignment was in accord with the provisions of a collective bargaining agreement then in effect.

An informal settlement conference was conducted on September 17, 1982, but the dispute was not resolved. On November 30, 1982, the parties attended a pre-hearing conference. A formal hearing was conducted in Santa Clara, California on December 14 and 16, 1982, and on January 5, 1983. Post-hearing briefs were filed and the matter was submitted for decision on April 4, 1983.<sup>2</sup>

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Board (hereafter PERB or Board). Unless otherwise indicated, all statutory references in this decision are to the Government Code. Section 3543.5 of the Act provides that it shall be unlawful for a public school employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

<sup>2</sup>**At** the pre-hearing conference, the District filed a motion to strike paragraph 4 of the amended charge, which stated:

Charging party filed a timely grievance concerning his reassignment. The grievance was denied at Levels 1 and 2. The exclusive representative and district have refused to

## FINDINGS OF FACT

### A. Background.

At issue in this case is James Hamm's reassignment in May 1982 from Wilcox High School to a junior high school English position for the 1982-1983 school year. An earlier reassignment attempt in April 1982 had been the subject of a successful grievance and is discussed in more detail below. The District contends that Hamm's reassignment was the result of declining enrollment, and was carried out in accord with the existing collective agreement. Hamm contends that staffing cutbacks and workload ratios were adjusted to mask an underlying motive to retaliate against him for the exercise of protected rights under the EERA.

Hamm was hired as a high school English teacher in the District in 1967. For 14 years he taught at Peterson High

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submit the matter to arbitration and/or to  
allow charging party to do so on his behalf.

The District asserted that this allegation was irrelevant to a determination of whether the respondent's conduct violated the Act because taking Hamm's grievance to arbitration under the contract was solely within the authority of his exclusive representative. The charging party was given an opportunity to respond to the motion, and, at the start of the formal hearing, the motion was denied without prejudice to renewal at a later stage. After reviewing the briefs submitted at the end of the case, the motion to strike is granted. There was no evidence introduced that the employer directly or indirectly influenced the exclusive representative's exercise of its contractual prerogative to decline arbitration.



School. In 1981-82, after several years of declining enrollment, Hamm was reassigned to Wilcox High School as part of a District-wide structural reorganization that closed two high schools and consolidated enrollment in two others. In Hamm's last few years at Peterson, and at Wilcox, he was elected department chairman by his fellow-teachers. The department chair is subject to a veto by the school principal, a power rarely if ever exercised. The chair also receives a \$500 stipend, but is still considered a rank-and-file employee.

During Hamm's last eight or nine years at Peterson, his supervising principal was Charles Passantino. After the District's consolidation, Passantino became the principal at Wilcox, again supervising Hamm. Passantino's testimony and other evidence indicates that Hamm was an outstanding teacher, as well as a committed proponent of a fully-staffed English department and program.

B. Involvement in protected activity.

Since 1969 Hamm has been the president of an affiliate of the American Federation of Teachers in the District. In that capacity he has represented teachers in many grievance and administrative proceedings, and his role was well-known to District managers, including Passantino. Hamm's representative advocacy on behalf of teachers continued after an affiliate of the California Teachers Association (hereafter Association) became the exclusive representative in the late 1970's. Often,

Hamm represented teachers on grievances, in layoff or dismissal hearings, and, with the Association's consent in one instance in 1981-82, in an arbitration proceeding.

There was evidence that in the year or so prior to his reassignment Hamm's advocacy intensified and broadened in perspective. In 1980-81, for example, he was active in an election campaign to recall school board members after they had voted to consolidate the District's high schools. The consolidation resulted in the layoff or transfer of many teachers. Among other things, Hamm secured a local AFL-CIO endorsement of the recall drive. Passantino conceded in his testimony that he might have advised Hamm to stay neutral on the issue, but denied Hamm's impression that Passantino warned of possible retaliation. The recall effort lost.

In his first year at Wilcox, Hamm had an ongoing dispute over curriculum planning with the assistant principal and registrar, Roger Hoy. Hoy had been an administrator at Wilcox since 1972. Hamm argued that more English writing courses were needed at Wilcox in order to accommodate the number of students enrolled, the District's programmatic priorities placing emphasis on English, and the limits on class size that had developed in practice at Wilcox under Passantino. Hamm testified that the class size limit at the time for composition courses was 27 or 28 to 1, and lower for remedial and

laboratory programs. (At Peterson, Hamm and Passantino had informally abided by a 25:1 class size for writing.) Eventually, at the start of the spring 1982 semester, Passantino accepted Hamm's view, and six new English sections were added. To accomplish this, one teacher, Rebecca Peterson, was temporarily reassigned for that semester from a junior high school. Another teacher, Ruth Werfel, at an 80 percent load, had one more class added to her schedule. In addition, other teacher assignments were juggled to add four more writing classes during the year.

This resolution was only short-term, however. The staffing dispute continued between Hamm and Hoy as planning took place for the 1982-83 school year. This conflict lasted through the balance of the 1981-82 school year, carrying over, under the Association's auspices, to the year following.

Finally, in 1981-82, Hamm had disagreements about a new Wilcox administrator, Mike Rambis. Hamm and other English teachers were upset that a new manager was hired while they saw their own department as understaffed. Thereafter, there were also disputes with Rambis over lesson plan requirements and the manner and timing of evaluations. Passantino's intervention was needed in each instance. Hamm's claim that he had already fulfilled the lesson plan requirement, by posting his plans in class rather than submitting them to the administrator, was

accepted by Passantino. The evidence is unclear about what happened to the evaluation process.

Both Hamm and Passantino described their relationship in positive terms of mutual satisfaction, at least for the period before the consolidation decision and recall campaign. Indeed, there was evidence that Passantino assigned Hamm to Wilcox even though there was a more senior English teacher available, and also urged that Hamm serve as department chairman in their first year at Wilcox.

Despite this history, or perhaps because of it, the new school situation apparently altered the previously satisfactory working relationship of several years. For one thing, there is evidence, in the credible and detailed testimony of teacher Dennis Mulvihill, that Hamm's pressure on Passantino regarding the disputes with Hoy and Rambis caused Passantino to lose face with those managers. Additionally, even Passantino conceded that he had heard rumors at Wilcox that the Association believed that Hamm was "running the school" after the staffing and lesson plan challenges. In fact, Hamm testified that, in the informal first-step discussion of Hamm's grievance against his second reassignment in May, Passantino,

. . . told me that there were other things that he could not tell me about right now. And he also made the statement that I gave you a grievance you could win, the first grievance.

Q. What was your understanding of the meaning of that comment?

A. That somehow he was under pressure to reassign me.

Q. Did you ask him what the remark about other things . . . considered meant?

A. Yes, and he said he could not tell me right now and he said I'll, sometime, I cannot tell you right now.

Q. And at that time you were discussing your reassignment as a grievance conference?

A. Yes.

Q. And he refused to indicate what other factors were being considered?

A. Yes. He clearly stated there were other factors and he would not discuss them.  
(Reporter's Transcript, Vol. I, p. 52.)

When he testified, Passantino could not recall (but did not deny) this grievance conference or these statements.

Finally, in terms of protected activity, Hamm's April 1982 grievance against his first reassignment was the first grievance he had ever pursued that involved himself or that was directed against Passantino personally. The grievance specifically challenged the principal's judgment about Hamm's qualifications and the inapplicability of seniority principles. After Hamm prevailed on this first grievance, he and Passantino had no conversation about the subject. Within a few weeks, however, without further explanation from Passantino, Hamm received his second reassignment notice.

C. Declining enrollment projections.

Throughout the late 1970's, the District's enrollment declined at all grade levels. This pattern led to the high school consolidation in 1981-82, and forms the backdrop for the events at issue in this case.

In 1981-82 there were 1771 students at Wilcox (excluding a nominal number of special education enrollees). During that year, 1981-82, there were 12.0 full-time equivalent positions (or, FTE's) in English in the first semester, and 13.2 FTE's in the second semester. The increase reflected the five courses taught by Peterson and the one extra course by Werfel.

At the start of 1982, the District's central staff projected an enrollment decline at Wilcox to about 1565 for the next school year, 1982-83. Based on this projection, Passantino announced in March 1982 an anticipated cutback of 9.8 FTE's, of which 1.4 were to be taken from the English department staff.

The record is somewhat inconclusive and inconsistent on these projections. The projected decline of 200-plus students, the only uniformly accepted figure in the District's records, should have yielded an approximate 7.0 FTE loss, if the school-wide average figure of 30 students per class was utilized as the District contends it was. On the other hand, Hoy testified that he had informed Passantino that the English department staffing level should be geared to a student

enrollment of about 92 percent of the projected 1565; with the 92 percent representing the student body percentage that had been enrolled in English in the fall 1981 semester.

If computed on that basis, the English cutback, on a 30-student per class average, should have been about 2.2 FTE's, or greater, according to the administration. For this reason, Hoy testified that Passantino's March figure of a 1.4 FTE reduction in English was a computation error, later to be corrected to a 2.2 figure once the student pre-enrollment preference tallies were taken in April and May. In accord with this are two documents; one prepared in mid-February that projected an English reduction of 2.2 FTE's; another, undated but placed after an April or May student preference tally, also showed a 2.2 English FTE loss. Both of these documents projected a total 10.8 FTE cutback. To confuse matters, however, by mid-May, although the English department cutback was increased, the total school-wide FTE reduction remained a projected 9.8, as Passantino stated in his reassignment notice to Hamm, or, 9.6 FTE's as stated in the distribution of the involuntary transfer pool.<sup>3</sup>

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<sup>3</sup>The school-wide FTE teacher reductions actually projected, in chronological order, were the following: 10.8 FTE's on February 16, 1982 (Respondent's Exhibit 12, hereafter R.Ex.); 9.8 FTE's on March 24 and April 2, 1982 (Charging Party Exhibits 6 and 7, hereafter CP.Ex.); 11.2 FTE's in late April or May (R.Ex. 9); 9.8 FTE's on May 17, 1982 (CP.Ex. 10); and, 9.6 FTE's on May 19, 1983 (CP.Ex. 11).

An additional weakness in the evidence related to the use of a 92 percent projection standard is that it was otherwise unrelated to any contemporaneous documentary records, unlike the 200-plus student loss that was predicted. Thus, it is impossible to corroborate application of the percent standard to the English department or to any other course area, much less judge the weight this approach was given within the mix of other standards that were used.

Beyond this insufficiency, the 92 percent figure was tied to fall 1981 English enrollment, thereby disregarding the obvious fact that at least six more classes (taught by Peterson and Werfel) were added in the spring 1982 semester in order to satisfy programmatic and student needs, as well as to lower class sizes. Assuming some validity to the percentage standard as a planning tool, the District should have raised its projected enrollment percentage to take these required classes into account. Had the percentage standard been fully and fairly computed, additional English sections would have been projected for 1982-83.

On the related issue of translating the expected 200-plus student loss into an FTE reduction, Passantino's testimony represented the only evidence by a District official answering the direct question of why the proposed school-wide cutback went beyond the 7.0-plus FTE figure that follows from the estimated loss. Passantino stated that the higher figures



resulted from the addition of administrative and counseling cuts, as well as an initial base figure in February 1982 of 1620 students, not 1565. But this explanation does not square with the several documents produced and used by the District (and by Passantino), all of which, commencing in February, projected a school-wide drop to about 1565, as well as teacher cuts in the range of 9.6 to 11.2, exclusive of any administrative or counseling reductions.

Beyond this point, as noted above, during spring 1982 Hamm disputed the District's projections of a 200-plus student loss for 1982-83. He contended that enrollment from feeder junior high schools would be up, thereby requiring more composition classes for sophomores. He also argued that not enough English courses were planned for juniors and seniors needing to fulfill their program requirements. According to the student preference tallies conducted in April and May, Hamm claimed that about 1700 students would be enrolled at Wilcox; that is, more than 100 above the District's estimate.

Hoy and Passantino testified that they rejected Hamm's predictions, and relied instead on the 1565 student figure stated by a District official who had historically been very accurate in his projections. Additionally, Passantino was not inclined to risk a higher enrollment because he had incurred a deficit in paying for Peterson's one-semester reassignment. He was fearful that the ultimate student attendance in 1982-83,

upon which school income would be based, would not justify continuing a staffing level beyond the District's own projections. However, the attendance figure in October 1982 that was eventually used for income computation in 1982-83 was about 1680.

D. The April 1982 reassignment and grievance.

In late-March 1982 Hamm was informally notified that he was going to be reassigned. Official notice from Passantino followed on April 2. The principal cited declining enrollment as the justification for a school-wide 9.8 FTE reduction. He referred to sections 23.501, 23.501.2 and 23.512 of the collective agreement with the Association as the basis for his determination that Hamm would be leaving.<sup>4</sup>

On April 12, Hamm received notification of the names of teachers placed in the involuntary transfer pool, including his

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<sup>4</sup>Those contract sections were part of an article entitled "Reassignment and Transfer Related to Discontinuation of School and Classes," and stated in full:

23.501 The following guidelines will be utilized when transfers are required as a result of a reduction in full-time teaching positions:

. . . . .

23.501.2 When a full-time teaching position is reduced in a school at the 7-12 level, the employee to be transferred shall be the teacher in that school with the least District seniority (certificated service in

own, and of the openings available throughout the District.  
His grievance was filed the same day.

Hamm's grievance alleged that the seniority requirement of the contract was violated. An addendum to his submission referred to his extensive teaching experience in writing courses, to his ability to teach drama, and to his

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the District) so long as it is in the best interest of the District, or unless there is a volunteer. (See 23.512)

. . . . .

23.512 Procedure related to reassignment and transfer of certificated personnel due to discontinuation of school or classes at the 7-12 level:

1. The principal shall determine the least senior member(s) of the certificated school staff.

2. The principal shall attempt to reorganize his/her program in order to utilize the least senior teacher (s) to provide for the necessary reduction in certificated staffing positions.

3. Should #2 above not provide for an appropriate program for the students, the principal shall continue this procedure in inverse order of seniority (low or high) until:

3.1 The needs of the students are met;

3.2 The necessary reductions are accomplished.

4. Those individuals who have been reduced through the above procedure shall be made a part of the involuntary transfer pool of the District, and they will be eligible for assignment based upon their seniority, credential and experience.

then-developing training and expertise with word processing and computer equipment, including the computer education Hamm had received. Passantino denied the grievance on April 15, 1982, claiming that the reassignment was in the school's best interest because another teacher had demonstrated ability in the drama and computer areas, and because that teacher's 80 percent assignment fit in with the overall projected cutback. The importance of a drama class was emphasized by Passantino. The date of hire of the teacher retained, Steve Smallwood, was 1969, two years after Hamm's.

A few days later Hamm appealed the denial to the District's personnel manager, Nick Gervase. Hamm restated his qualifications, emphasized the importance of the writing program, urged that he be retained to teach a speech and debate course, and challenged the conclusion that Smallwood had better computer-teaching qualifications. Hamm also argued that giving preference to a part-time employee, before student preferences had even been assessed, gave him an unfair advantage over full-time teachers.

Gervase overruled Passantino and granted Hamm's grievance on April 29. Gervase's conclusion, which was issued following a conversation with Hamm, was that Hamm was sufficiently qualified and experienced to teach drama, computer and other courses, and had greater seniority than Smallwood.

At the formal hearing, Passantino testified that he could not recall Hamm's grievance addendum outlining his computer skills. However, Passantino's uncertainty about what he knew when the initial reassignment was grieved, was outweighed by Hamm's clear and definite recollection of discussing his own and Smallwood's qualifications with Passantino at their first-step informal conversation. Passantino could not recall but also did not deny this account in his testimony. Hamm's recollection was also clear in his insistence that the addendum was attached to the formal document filed on April 12. Not only was Hamm's recall sharper than Passantino's, but it was corroborated by another witness who had a conversation with Passantino about the time the first grievance was filed. In that conversation with Ray Elwell, an Association negotiator, Passantino indicated an awareness of Hamm's contention that he could carry out computer work intended for Smallwood. In any event, Passantino conceded that he had reason to know about Hamm's computer background from a conversation with Gervase about the time of Gervase's ruling at the end of April.

E. The May 1982 reassignment and grievance.

Nearly three weeks after Hamm prevailed on his first grievance, he was again notified by Passantino that he would be reassigned. The May 17 notice was exactly the same as the earlier April notice, citing a 9.8 FTE reduction and referring to the previously noted contract sections. Two days later, Hamm received notification of the teachers included in the

involuntary transfer pool, and of school openings in the District. Again, Hamm was in the pool. No new circumstances were cited in either communication to explain this reassignment to Hamm, and, according to Hamm, no further explanation was offered by Passantino when Hamm inquired at his first-step grievance conference. Instead, as observed above, Passantino referred to undisclosed motives as the reason for his action.

Hamm filed a grievance on May 23, referring to the previous resolution in his favor, and also alleging that the second reassignment violated the collective agreement's prohibition on discrimination.<sup>5</sup>

Shortly thereafter, Hamm's grievance was denied by Passantino. On June 8, Hamm appealed to Gervase. Hamm asserted that the reassignment was also an unfair labor practice. Gervase denied the grievance appeal on June 18. Hamm's attempt to have an arbitration hearing was unsuccessful when the Association declined either to take the matter to arbitration or to allow Hamm to represent himself.

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<sup>5</sup>The relevant contract article states:

10.3 Legal Rights

The District and the Association agree not to impose or threaten to impose reprisals on District employees, discriminate against District employees or otherwise interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this Agreement.

At the formal hearing, Passantino testified that his rationale for the second reassignment was that the student preference tallies conducted in April and May revealed a need to make deeper cutbacks than originally projected for the school as a whole, as well as for the English department.

F. The student preference tallies.

The District has traditionally used student pre-enrollment surveys as a method to project the variety of courses and the number of sections that would be assigned within the context of the anticipated school-wide level of authorized FTE's. According to Hoy, the results of the first survey, dated April 29, 1982, indicated that approximately 104 sections were required for the next year in English. (Hoy testified that he used a 27:1 class size ratio for the composition courses.) Figuring five sections per full-time teacher per semester, this worked out to about 10.0-plus FTE's. This is consistent with the District's claim that the survey justified a deeper cut in English than the 1.4 FTE's originally announced, but is still inconsistent with the projected overall decline for Wilcox of about 200 students.

The April survey was not a complete poll, however. During the next two weeks the preferences of several dozen students were added to the original figures. The revised, updated results were printed on May 12, 1982. The results showed a marked increase in the number of English department signups, particularly in writing courses. A new estimate by Hamm

suggested that the appropriate number of course sections to meet this revised demand was 110 for 2 semesters. Translated into FTE's, this would require 11 full teaching positions.

Nevertheless, according to Hoy, the updated May tally did not justify a modification of the planned FTE cutback in English, even if class size averages appeared to increase. He anticipated some smaller courses could be dropped, and that the extra signups could be spread among the existing sections. Even if this approach resulted in a somewhat higher class size average, Hoy anticipated that over the next year student attrition would reduce class sizes. In this regard, Hoy conceded that the second tally raised a doubt in his mind about the accuracy of the District's initial projection of an enrollment decline. But, along with Passantino, Hoy saw no compelling reason to increase the previously accurate central staff projection because it was also expected that the spring preference total would go down over the summer.

G. Fall 1982 scheduling and assignments.

As the 1981-82 school year drew to a close, in late May or early June, the English department submitted a proposed schedule for the next year. Hoy rejected the plan in early June because it included more classes and teachers, Hamm among them, than he believed were justified.

On June 3, 1982, the District and the Association entered into a new contract, effective the next month, that expressly



established class size averages for the English and physical education (P.E.) departments. For example, writing courses were to be based on a 27:1 average, and P.E. classes on a 40:1 ratio. (In the past, P.E. class sizes averaged 45:1.)

The new contract immediately affected the P.E. staff by altering a tentative plan that Passantino had pursued in May to transfer a P.E. teacher, Ken Smith, to teach three English courses. Smith, who had greater seniority than Hamm, had grieved the reassignment shortly before the new contract was finalized. According to Passantino's response in early June, the new contract rendered the dispute moot and Smith remained in P.E.

However, the English department's projections were not altered as a result of the new contract. The District completed its planning process in June and July, issued a master directory and course schedule, and filled in teacher assignments over the summer. In the directory, writing classes were still listed with a 30-seat capacity. At this juncture, Hamm was treated as a reassigned teacher, along with Smallwood and other English department personnel.

In addition to the new contract class size and the Ken Smith case, a number of other events took place from June through October 1982 that are relied upon by the charging party to cast doubt upon the District's reassignment decision.

First, Hoy informed the English department that a teacher in the Wilcox home economics department, Vera Casasanta, would be assigned to teach two English courses. The master directory released in June, however, listed Casasanta as teaching only one course, the workload she eventually carried once the next school year began.

Casasanta was the sole English teacher in 1982-83 who had less seniority than Hamm. She had been hired in 1969. Passantino explained that Casasanta was the only qualified cosmetology teacher in the District. In order to maintain the two courses in that vocational area, Passantino believed he was required by District policy to offer her not just an 80 percent home economics workload, but a 100 percent workload, including the single English course she taught. No written policy was introduced in evidence requiring the District to give teachers in mandated course areas such as vocational arts a full-time program. Nor, for that matter, did Passantino or any District official cite any other instance where the policy was applied. On the other hand, the record is replete with part-time instructors in several departments that were also designated by Passantino as mandated program areas.<sup>6</sup>

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<sup>6</sup>The District's seniority roster also indicates that two English teachers in 1982-83, Jeanette Brunton and Dick Tuttle, had the same seniority as Hamm but remained in the department. Although no direct evidence was offered by the employer about its decision to keep those employees at Wilcox, instead of keeping Hamm, circumstantial inferences may be drawn. For

Second, by June, Passantino determined that the enrollment figures for the speech and debate class, and for the drama course, were too low to warrant inclusion in the next year's schedule. The student pre-enrollment for these courses, which Hamm was qualified to teach, was comparable to enrollment in previous years, and, in the case of speech and debate, the 24 signups were higher than the 20 student cut-off point that Hoy claimed was applied.

Third, just before the start of school in early September 1982 Passantino assigned three computer classes to Jean Suzuki, a math teacher with the same seniority as Hamm but whose name had not been mentioned previously in connection with the subject area. Passantino claimed that Suzuki was hired to teach computer programming, not the computer literacy courses that Smallwood and Hamm were qualified to teach. Passantino explained at the hearing that the programming orientation was based on the signups of incoming sophomores who had already

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example, it may be indirectly inferred from other evidence that Tuttle's assignment to English-language acquisition courses required foreign language ability that Hamm did not possess. Brunton, on the other hand, taught a traditional mix of literature and writing courses, as well as serving as the yearbook supervisor. Yet, the yearbook program would not constitute a likely distinction from Hamm's qualifications in light of Passantino's request to Brunton in fall 1982, which she rejected, that she switch the yearbook class to an after-school hour (at less pay), in order to take on an extra English course the principal wanted to add.

taken computer literacy instruction, and that Suzuki's math background fit with this approach. This late summer decision, according to Passantino, was also consistent with a last minute decision of the school board to purchase new computer equipment for another high school in the District, thereby allowing a transfer of additional machinery to Wilcox.

Other evidence, however, raises questions about Passantino's decision to hire Suzuki. For one thing, student pre-enrollment figures showed approximately a 200 to 120 preference for literacy over programming. This was consistent with a pre-school teacher schedule released in the summer that planned two literacy courses and one programming course, leaving the teacher assignment "to be announced." More significantly, the District did not call Suzuki as a witness, and Hamm's testimony about his own qualifications as well as his conversations with Suzuki when she was assigned indicated that he was equally well-qualified to teach the computer courses she was eventually given, since each had completed comparable training programs. Indeed, Hamm testified without contradiction that the new equipment purchases only resulted in the transfer of more of the same kind of machinery that Wilcox already possessed. In any event, Passantino never made any inquiry about Hamm's computer ability, despite the resolution of the first grievance, and never offered him the part-time, 60 percent position offered Suzuki.

Fourth, the average writing class size in the English department exceeded contractual norms, according to the District's own admission, after the school year began. In order to adjust to the situation, and to accommodate the higher than projected enrollment, Passantino consolidated some lower enrollment reading and typing classes, and shifted teachers to take on three new composition courses. These teachers included one from the business department and another from the counseling staff. Each teacher had seniority greater than Hamm. Even after this switch, other evidence in the form of a class size protest by the Association suggests that the section averages were still beyond the contractual limits, and that Passantino, citing a 7 percent drop over the course of the 1981-82 year, expected to deal with the problem by gradual student attrition.<sup>7</sup>

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<sup>7</sup>The uncontradicted Association figures, dated October 11, 1982, reveal that 11 writing classes had a total of 30 students over the appropriate average, 8 sophomore composition classes were 22 students over the average, and the 7 other writing courses were a total of 9 students over the average.

The testimony of Roseanne Rasul, also uncontradicted, provides a telling insight about Passantino's awareness of his class size problem at the start of the school year. According to that witness, who had less seniority than Hamm, when she inquired about picking up some English classes instead of continuing as a substitute teacher, Passantino told her she could have the job if she would get Hamm off his back. This comment might be viewed as a joke, as there was other evidence that Passantino had a lively sense of humor. However, this

The significance of these larger class sizes, regardless of attrition in the coming months, was that the District's attendance-based income for 1982-83 would be derived from enrollment figures computed in October. Thus, in effect, the District did not utilize the full number of FTE's in English to which it would be entitled under the state's school income formula.

Fifth, a number of sophomore students had no writing class available in the first semester of 1982, although the District's English sequence apparently required two consecutive semesters. The estimates of the number of unplaced sophomores varied from 25 to 30 (Passantino and Hoy), to 38 (the Association). Hoy testified that the sophomore English program could be satisfied by allowing those sophomores to double-up in later semesters with two courses at the same time. He offered no explanation about how this would affect the prerequisite nature of the fall semester course work. Nor did Hoy explain what would be done to create class space in the spring within a program supposedly fixed for the entire year. In the end, to avoid hallway wandering, the unplaced sophomores were assigned to a study hall for one period a day.

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mitigating explanation was not made by respondent for the comment to Rasul and, under the circumstances, the administrative law judge finds that Passantino's remark should be taken at face value as an indication of the pressures he felt arising from large class sizes after Hamm's reassignment.

Finally, according to Passantino's testimony, the actual FTE figures for Wilcox in 1982-83 reveal that the reduction from the prior year totaled only 6.6 FTE's; that is, below the 9.6 to 11.2 reductions anticipated the previous spring. The 6.6 FTE figure also exceeded the necessary FTE reduction if computed on the basis of the actual decline in enrollment of about 100 students. On that basis, using a 30:1 school-wide class size, the Wilcox cutback should have been about 3.3 FTE's. Similarly, the final reduction in the English department of 1.6 FTE's subtracted from 12.0 FTE's in 1981-82 (excluding Peterson and Werfel), was below the earlier projection of 2.2 that was used to reassign Hamm. If taken literally, Hamm, as the next in order on the seniority ladder, had 0.6 of a position in the English department to which he was not assigned. This also does not take into account either the computer courses, or those English classes never created but nonetheless justifiable on the basis of actual enrollment and class size figures.

#### H. Credibility observations.

Hamm's overall testimony was forthright and clear and his recollection of details was impressive. He was obviously familiar with traditional departmental and school procedures, as well as with the educational needs of students established by District program requirements. It is noteworthy that Hamm willingly conceded that he had a longstanding positive

relationship with Passantino, while also admitting that he probably was, as Passantino described, a "pain in the ass" because of Hamm's staffing complaints in 1981-82.

Passantino's testimony, however, when he was examined as an adverse witness by the charging party, was too often glib and facetious, or evasive and non-responsive. From time to time, when Passantino's nervousness or embarrassment was most evident, he glanced toward his counsel as if to seek assistance. Passantino was also less than forthcoming or consistent when questioned on several points: for example, on the FTE reduction figures and plans that were used at different times; on his response, if any, to fluctuations in the student pre-enrollment tallies; and, on the comparative basis for his determination that Suzuki had better qualifications than Hamm to teach the computer courses. In contrast, the plausibility of Passantino's testimony improved when examined by the District's counsel, but this examination was often tied to leading questions and suffered from that limitation.

Although one can understand the uncertainties of a high school principal faced with cutting staff because of projected enrollment losses, therefore having to choose between many qualified instructors and worthwhile courses, that understanding and its related testimonial weight was eroded not only because of the demeanor problems described above, but



because of two significant failings in Passantino's recollection.

First, in connection with Hamm's computer instruction skills, Passantino denied knowledge of Hamm's relevant background when the Suzuki assignment was made.<sup>8</sup> Yet the record strongly supports the finding that Passantino was on notice, as early as April and no later than the previous May, that Hamm had substantial training and experience in the field. Second, when initially asked, Passantino denied knowledge that Smith filed a grievance about his English department reassignment, and only recalled the protest when shown Smith's grievance and his own response.

Rather than conclude that these were mere memory lapses in the context of a complex period of choices, the inference can be drawn that Passantino was attempting to obscure the availability of course work for Hamm, or to diminish Hamm's qualifications as known to Passantino when a crucial hiring decision was made.

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**<sup>8</sup>The** exchange with Passantino included the following:

Q. Do you recall what Mr. Hamm's background experience with computers was at that time?

A. I knew that he was using computers to make some crossword puzzles for his class but nothing more than that. (Reporter's Transcript, Vol. III, pp. 42-43.)

Finally, adverse inferences will be drawn from admissions attributed to Passantino by the testimony of other witnesses. In one instance, Passantino could not recall but also did not deny imputations of a pretextual reassignment and of an ulterior motive that were conveyed in a first-step grievance conversation with Hamm after the second reassignment notice. Passantino's complete failure to remember anything about the discussion cast a shadow over that part of his testimony. In another instance, Passantino's claim that he merely declined to discuss a still-tentative personnel decision with Mulvihill when asked by that teacher about Hamm's reassignment, was an inadequate explanation and denial of the point-by-point testimonial narrative given by Mulvihill that had the ring of truth. That testimony strongly suggested that Passantino's motivation was something other than strictly related to seniority, programmatic needs or Hamm's abilities.

#### CONCLUSIONS OF LAW

##### A. Introduction.

By its terms, section 3543.5 (a) of the Act prohibits discriminatory action against an employee for engaging in conduct protected by the EERA, including,

. . . the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. (Sec. 3543.)

In Carlsbad Unified School District (1/30/79) PERB Decision No. 89, and in Novato Unified School District (4/30/82) PERB Decision No. 210, the Board set forth the standard by which charges alleging discriminatory conduct under section 3543.5(a) are to be decided. The Board summarized its test in a decision issued the same day as Novato;

. . . a party alleging a violation . . . has the burden of making a showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision to engage in the conduct of which the employee complains. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected conduct. As noted in Novato, this shift in the burden of producing evidence must operate consistently with the charging party's obligation to establish an unfair practice by a preponderance of the evidence. (California State University, Sacramento (4/30/82) PERB Decision No. 211-H at pp. 13-14.)

The test adopted by the Board is consistent with precedent in California and under the National Labor Relations Act (NLRA) requiring the trier of fact to weigh both direct and circumstantial evidence in order to determine whether an action would not have been taken against an employee but for the exercise of protected rights. See, e.g., Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 729-730; Wright Line, Inc. (1980) 251 NLRB 150

[105 LRRM 1169] enf., in part, (1st Cir. 1981) 662 F.2d 899  
[108 LRRM 2513].<sup>9</sup>

Hence, assuming a prima facie case is presented, an employer carries the burden of producing evidence that the action "would have occurred in any event." Martori Brothers Distributors v. Agricultural Labor Relations Bd., supra, 29 Cal.3d at 730. Once employer misconduct is demonstrated, the employer's action,

. . . should not be deemed an unfair labor practice unless the Board determines that the employee would have been retained "but for" his union membership or his performance of other protected activities. (Ibid.)

B. Prima facie case.

Several factors, taken together, support a conclusion that the charging party demonstrated a prima facie case of discriminatory treatment. (After reviewing these factors, the District's business justifications will be examined.)

First, the charging party introduced sufficient evidence to satisfy the threshold requirement of a nexus between his protected concerted activities and his reassignment in May 1982.

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<sup>9</sup>The construction of similar or identical provisions of the NLRA, as amended, 29 U.S.C. 151 et seq., may be used to guide interpretation of the EERA. See, e.g., San Diego Teachers Assn. v. Superior Court (1979) 12 Cal.3d 1, 12-13; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616. Compare section 3543.5(a) of the Act with section 8(a)(3) of the NLRA, also prohibiting discrimination for the exercise of protected rights.

Leaving aside for the moment the protected nature of Hamm's activities up to and through the 1981-82 school year, his second reassignment notice in May followed less than three weeks after he had prevailed on a grievance challenging his first reassignment. Attempts to enforce negotiated terms, including the filing of grievances by individual employees, are considered by the Board to be participation in collective activity that is protected against retaliation. San Leandro Unified School District (2/24/83) PERB Decision No. 288; North Sacramento Unified School District (12/20/82) PERB Decision No. 264. The timing of the alleged discriminatory conduct is also a relevant analytical factor. (Id.)

The District contends that a nexus between Hamm's protest and his reassignment has not been adequately established because Hamm had been active in union affairs for many years without any District retaliation. However, Hamm's successful grievance in April was the first time he had a personal stake in a protest, and was also the first time he had directly challenged a Passantino decision. Passantino's failure to give Hamm any advance notice or explanation of the second reassignment, despite their long-standing relationship and instead suggesting concealed reasons, also indicates that the situation was not "business as usual." These factors distinguish the present case from the history of grievances involving other persons.

Furthermore, without resolving whether the first reassignment was discriminatory, ample evidence indicates that Hamm's protest activities intensified in 1981 and 1982 and put Passantino in difficult, possibly embarrassing positions. For example, Hamm's support for the school board recall campaign, over Passantino's opposition, was a dramatic means of appealing for community support to save school programs and jobs. Hamm's disputes with Hoy over enrollment projections also put Passantino in the middle of a conflict situation generated by Hamm, as did Hamm's protest regarding lesson plans and evaluations.

Nor is it relevant, from the District's standpoint, that, except for his May 1982 grievance, Hamm's concerted activities did not follow the usual path of working only through the Association as the exclusive representative. The activities were still protected under the Act. San Leandro Unified School District, supra, PERB Decision No. 288. Hamm's opposition to school closures in 1981 was patently related to teacher employment opportunities. His recall work securing the endorsement of the local AFL-CIO was consistent with this perspective. And his representation of fellow English teachers, in his capacity as a rank-and-file department chair, concerned issues of collective interest such as class size, workload and evaluation procedures, and the enforcement of negotiated rights. Although rumors of Association concern

about Hamm's success might reflect the sensitivity of an incumbent toward a rival union, there is no evidence that Hamm's substantive positions were actually opposed by the Association or that he sought negotiations to bypass the exclusive representative; indeed, the Association's class size protest in October 1982 seemed to pick up where Hamm left off the previous spring.

A second aspect of the prima facie case is evidence that Hamm's reassignment was inconsistent with other circumstances related to projected enrollment and course planning. These shifting and often conflicting justifications advanced by the District add to the charging party's case. Novato Unified School District, supra, PERB Decision No. 210. Most important, the District's announced FTE reductions (of a school-wide 9.6 to 11.2) were more severe than the level that could have been authorized according to the District's own projection that 200-plus students would be lost. The low class size averages for writing, remedial and laboratory courses, as well as the high priority and enrollment assigned to English, provide further support for this view.

There was also evidence that the projected enrollment increase between the first and second student tallies was disregarded, particularly for writing classes. This disregard was compounded when, according to the master directory, the new contract class size limits were not utilized in planning the

English department schedule in June 1982, although the contract changes were applied to physical education, the only other department affected. Hamm's second reassignment also contradicted the stated reasons for the first reassignment in April; namely, the importance of maintaining a drama course and the type of computer class needed. Last, speech and debate was dropped despite enrollment sign-ups exceeding the cut-off line.

A third element of Hamm's prima facie case is that courses were available for Hamm to teach. Hamm was qualified to teach the computer courses, drama, speech and debate, Casasanta's class, one or more of the new classes added in the fall, and the classes initially suggested for Smith and Brunton. Based on the uncontested figures in the Association's class size protest in October 1982, and the District's admissions in response, at least one or two more writing classes were called for if the contract class size limit was to be respected. In particular, Passantino's failure to investigate Hamm's computer abilities, or Hamm's availability for part-time work assigned to others, adds to Hamm's prima facie case. Baldwin Park Unified School District (6/30/82) PERB Decision No. 221.

Fourth, the District arguably violated the contract's seniority provisions by assigning Casasanta to teach English while reassigning Hamm. It is undisputed that Hamm was the more senior employee and was an excellent teacher who was well-qualified to teach in the department. Yet, when Hamm



conferred with Passantino after the second reassignment notice, the principal offered no explanation for his decision, a failing that supports Hamm's prima facie case. Rio Hondo Community College District (7/19/82) PERB Decision No. 226.

Fifth, the charging party offered evidence of disparate treatment in Hamm's reassignment, another relevant factor in a prima facie showing. Id.; San Leandro Unified School District, supra, PERB Decision No. 288. As noted, the new contract class size limits were applied to the physical education department, but not to English, despite the increase in the second student tally. The District also claimed that it applied a 92 percent enrollment projection to determine English department needs, but there is insufficient evidence that comparable percentage tests were applied to other departments, or that the 92 percent standard properly considered the increased English enrollment in spring 1982. Further, other teachers had been offered part-time or temporary high school assignments during the relevant time period in 1981-82 and 1982-83, including Mulvihill, Smallwood, Peterson, Werfel, and Suzuki. Meanwhile, Casasanta was given a full-time assignment by virtue of a cross-over to a different subject area. Hamm was never offered either a part-time or a cross-over assignment.

The weight of the evidence introduced by the charging party supports the inference that his protected activity was a motivating factor in his reassignment. The District's business justification defenses will now be considered.

C. Business justification.

The District offers several arguments to support its contention that Hamm was not the victim of discrimination, and that he would have been reassigned for 1982-83 regardless of his protected activity.

The District's first claim is that Passantino and Hoy reasonably relied on the historically accurate projections of the District's central staff in planning the cutbacks for the 1982-83 school year. However, this does not resolve the inconsistency between the depth of the proposed reduction (9.6 to 11.2 FTE's) and the amount that would have been called for assuming the central staff projection was accepted (7.0 FTE's). Nor does it excuse the use of a 92 percent projection standard that ignored a substantial enrollment increase during the year from which it was taken. In any event, as Hoy conceded, a doubt could be raised about the accuracy of the 1982-83 projection because of the increased pre-enrollment reflected in the second student tally dated May 12. The District's projections, therefore, were internally inconsistent at the outset. Then, when faced with figures that undermined the projections, the District either counted on attrition or relied on spreading the students among the same number of sections.

The District's managers testified that conservative budget planning limited the employer's adjustment of the initial

projections in order to avoid exacerbating the deficit carried over from Peterson's temporary hiring in spring 1982. But this approach fails to explain two important facts: first, that the FTE cutback was more extreme than called for by central staff projections, the 1981-82 English enrollment, and the unexpectedly high student tallies; and, second, that once the evidence in fall 1982 demonstrated the District's excessive reduction, steps were not taken to withdraw Hamm's reassignment and restore his position.

The District's second argument is that it did not violate the collective bargaining agreement when Hamm was reassigned, relying on the fact that all English teachers, with one exception, had seniority equal to or greater than Hamm's. As to the exception, respondent claims that the "best interest" of the District, in the words of the contract, required it to offer a full-time position to the lower seniority teacher.

Although Passantino asserted that the best interest of the employer was determined by an existing District policy requiring full-time employment for teachers in mandated subject areas, there was no showing of any written policy so providing, thereby serving as an exception to express contract language that seniority should be utilized. Nor was there any evidence offered of past cases in which the so-called policy was applied. To the contrary, according to the documentary record, part-time employment was widely used at Wilcox in programs

described by Hoy and Passantino as mandatory. Additionally, proposing to add one course for a less senior cosmetology-home economics teacher, rather than for a more senior and outstanding English teacher, strains any sensible interpretation of the contract's "best interest" language.<sup>10</sup>

The third element of the District's defense, related to the fact that teachers with the same or greater seniority than Hamm were retained (except Casasanta), is that there were no other English classes scheduled but unassigned and for which Hamm was qualified.

Granted that this assertion is correct, and that new English classes in fall 1982 were assigned to teachers who had other classes dropped because of last minute low-enrollment (for example, reading, typing); these classes, nevertheless, were opportunities for which Hamm was not considered at all. The District's claim also ignores the availability of unplaced sophomores who were left in a study hall, students who had signed up for English electives that were later dropped, and the possibility of creating more writing classes given the class sizes that exceeded contract limits.

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<sup>10</sup>The conclusion in the text above accepts for argument the District's interpretation that the contract did not require strict school-wide seniority as the basis for reassignments, but that the District was allowed flexibility in order to keep certain programs and specially qualified teachers. Regardless, there was no showing that the home economics-cosmetology program was in jeopardy, thereby forcing the District to assert its contractual leeway.

Even if, as the District claims, the proportion of English sections to the number of total sections for Wilcox was virtually the same in 1982-83 as the year before, the fact remains that Hamm could have been used to teach selected courses and, further, that more sections could have been justified in terms of actual enrollment upon which school income would be based. Moreover, as declining resources forced the District back to a basic coursework emphasis, one would expect a high-priority subject area such as English to increase its proportion of classes relative to other subjects. The District's denial of discrimination would be more persuasive had there been any offer to Hamm, or even an inquiry, related to the change in circumstances and the availability of new courses after Hamm's reassignment notice in May. Compare Office of the Los Angeles County Superintendent of Schools (12/16/82) PERB Decision No. 263 (later employer invitation to apply for vacant position refutes inference of discrimination).

A fourth District argument, regarding the selection of Suzuki to serve as a computer teacher for all three computer classes, must also be rejected. For one thing, the employer's evidence was inadequate to sustain its point that she was better qualified. Suzuki was not called as a witness to describe her qualifications. Passantino's hearsay testimony was outweighed by Hamm's grievance addendum, by Hamm's direct testimony about his own qualifications comparable to Suzuki's, and by Hamm's more credible hearsay account of his conversation with Suzuki when she was assigned.

This conclusion rejecting the District's justification is also consistent with other relevant facts: that Passantino made no effort to investigate Hamm's qualifications when the late-August assignment was made; that Suzuki's name had never before been raised in connection with the computer classes; that the focus on computer programming, effective in August, contradicted the long-term prior planning that emphasized computer literacy classes in keeping with the overwhelming student preference in that area; and, that the machines transferred to Wilcox involved more of the same equipment that Hamm was qualified to use in teaching--as determined in the first reassignment grievance. For all of these reasons, and regardless of the need for some amount of computer programming course work, the administrative law judge discounts the District's business explanation, first presented at the time of the hearing, as a justification for selecting a teacher other than Hamm.

A fifth defense advanced by the employer is that the effective decision-maker in this case was Gervase, the personnel manager, and not Passantino, and that there was no showing of discriminatory animus by Gervase. It is true that Gervase had the authority to overrule Passantino, as occurred on the first grievance. But Passantino, in his role as the school principal, made all the basic staffing decisions for his school, with only limited review under special circumstances.

Thus, this case is far different from those Board decisions dismissing claims of discrimination where there was no showing that the effective decision-maker (Passantino here) harbored discriminatory motivation. Compare, e.g., Moreland Elementary School District (7/27/82) PERB Decision No. 227; Konocti Unified School District (6/29/83) PERB Decision No. 217.

Finally, in assessing the merit of the District's asserted business justifications, the administrative law judge has given substantial weight to the inadequacies of Passantino's testimony. This testimony was poor in several ways and would tip the scales against respondent even if the other evidence indicated a closer case. Passantino's demeanor showed an inclination to hide, obscure and belittle relevant facts, rather than to be forthright and open. He also had important lapses of memory that seemed inherently improbable; for example, regarding Hamm's computer expertise and Smith's grievance. In conjunction with these factors was Passantino's failure to fully explain inconsistencies in the District's projections, his own planning, and eventual enrollment; his weak rationales for hiring Casasanta and Suzuki; and, the context of tension and personal challenge to Passantino, as confirmed by other witnesses, raised by Hamm's repeated opposition in a new school setting. This last facet was underscored not only by Passantino's failure to give Hamm any advance notice or explanation of the second reassignment, but

also by the principal's veiled comments to Hamm that were perhaps intended to deflect the antagonism of his long-time associate.

In sum, even if Passantino's motivation was mixed, and he was attempting to reduce the Wilcox teaching staff to meet declining enrollment, a preponderance of the evidence supports the conclusion that Hamm's reassignment would not have occurred but for Passantino's dominant discriminatory motive, albeit a motive probably arising under the pressure of his relationship with other administrators. For this reason, the District's conduct constituted a violation of section 3543.5(a) of the Act.

#### REMEDY

Section 3541.5(c) of the EERA states:

The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

A customary remedy in a case of unlawful discrimination is the issuance of a cease and desist order, and reinstatement and back pay (with 7 percent interest) if a job has been lost.

Santa Clara Unified School District (9/26/83) PERB Decision

No. 104 at pp. 26-28; Marin Community College District

(3/21/80) PERB Decision No. 145 at pp. 19-20. A cease and desist order is appropriate here, to prohibit a repetition of the unlawful conduct.



A reinstatement remedy is also appropriate, starting in the next school semester (San Leandro Unified School District, supra, PERB Decision No. 288), along with a make-whole back pay award of the \$500 department chairman stipend. Reinstatement and back pay will effectuate the policies of the Act by ensuring that the victim of the discriminatory conduct will be restored to the position and benefits he would have enjoyed but for the occurrence of the employer's unlawful conduct.<sup>11</sup>

It also is appropriate that the District be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the District indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity and to take certain affirmative measures. A notice effectuates the purposes of the EERA that employees be

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<sup>11</sup>The documentary evidence suggests that the pattern of declining high school enrollment in the District will continue into the 1983-84 school year and beyond, raising the possibility that Hamm would have been reassigned for the coming year regardless of discriminatory motivation. If the District can show at a compliance hearing that it would not presently have a position available in the normal course of events, then immediate reinstatement would be unwarranted and Hamm would have to await the next available opening. Santa Clara Unified School District (5/7/80) PERB Decision No. 104a. Of course, if such is the case, the parties with the PERB's approval might arrive at their own settlement adopting an alternative to the proposed order.

informed of the resolution of the controversy, and will announce the District's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69; Pandol and Sons v. Agricultural Labor Relations Bd. (1979) 98 Cal.App.3d 580, 587; NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

#### PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3541.5(c), it is hereby ordered that the Santa Clara Unified School District and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Restraining, discriminating against, or otherwise interfering with the rights of employees, and James Hamm in particular, because of the exercise of their right to participate in an activity protected by the Educational Employment Relations Act.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(a) Upon his request, reinstate James Hamm to his former position, or its equivalent position, at Wilcox High School effective the beginning of the 1983-84 school year, without prejudice to his seniority and other rights and privileges.

(b) Make James Hamm whole for any loss of pay or other benefits he may have suffered, including a \$500 stipend

for service as a department chair. The amount paid shall include interest at the rate of 7 percent per annum.

(c) Within five (5) workdays after this decision becomes final, prepare and post copies of the NOTICE TO EMPLOYEES attached as an appendix hereto, for at least thirty (30) workdays at its headquarters offices and in conspicuous places at the location where notices to certificated employees are customarily posted. It must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material.

(d) Within twenty (20) workdays from service of the final decision herein, give written notification to the San Francisco Regional Director of the Public Employment Relations Board of the actions taken to comply with this order. Continue to report in writing to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the Charging Party herein.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on July 5, 1983, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code title 8, part III, section 32300. Such statement of exceptions

and supporting brief must be actually received by the Public Employment Relations Board at its headquarters office in Sacramento before the close of business (5:00 p.m.) on July 5, 1983, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305 as amended.

Dated: June 14, 1983

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BARRY WINOGRAD  
Administrative Law Judge